FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1976

TEAMSTERS LOCAL UNION 657, PETITIONER

v.

JESSE RODRIGUEZ, ET AL.

SOUTHERN CONFERENCE OF TEAMSTERS, PETITIONER

v.

JESSE RODRIGUEZ, ET AL.

EAST TEXAS MOTOR FREIGHT SYSTEM, INC., PETITIONER

v.

JESSE RODRIGUEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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INTEREST OF THE FEDERAL AMICI CURIAE

The United States and the Equal Employment Opportunity Commission (EEOC) are charged with en-

forcement responsibilities with respect to discrimination in employment under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (Supp. V) 2000e *et seq.*[1] Pursuant to this authority, the government has processed numerous charges of discrimination implicating trucking industry practices similar to those challenged in this case.[2] The failure to assign minorities to line driver positions, and the existence of company policies and collective bargaining agreements which perpetuate such assignment discrimination are practices common to all Title VII trucking industry litigation.

Subsequent to the filing of this private litigation, the United States initiated a nationwide pattern and

[1] Although the Attorney General's authority to initiate Title VII suits against private employers has been transferred to the Equal Employment Opportunity Commission, the United States continues to participate in trial and appeal of some of those cases it initiated and as *amicus curiae* in cases involving issues of general importance to the enforcement of Title VII. Moreover, the Attorney General has authority to enforce Executive Order 11246, 30 Fed. Reg. 12319, which prohibits discrimination in employment by federal government contractors.

[2] Suits brought by the government against the trucking industry include *United States* v. *East Texas Motor Freight System, Inc.*, 10 EPD ¶ 10,345, p. 5415, 10 FEP Cases 971 (N.D. Tex.), appeal docketed, No. 75–3332, C.A. 5; *United States and Equal Employment Opportunity Commission* v. *Trucking Employers Inc.*, C.A. 74–453 (filed March 20, 1974, D. D.C.); *United States and Equal Employment Opportunity Commission* v. *Interstate Motor Freight System*, C.A. G137–72 (filed May 11, 1972, W.D. Mich.); *United States and Equal Employment Opportunity Commission* v. *Strickland Motor Freight*, C.A. 3–5394–A (filed December 23, 1971, N.D. Tex.); and *United States* v. *Lee Way Motor Freight, Inc.*, 7 EPD ¶ 9066, 7 FEP Cases 710 (W.D. Okla.).

practice suit against petitioner East Texas Motor Freight. Most of the relief was secured by consent decree; however, issues of proper transfer and seniority relief are currently in litigation before the Court of Appeals for the Fifth Circuit.[3] *International Brotherhood of Teamsters and T.I.M.E.–D.C., Inc.* v. *United States and Equal Employment Opportunity Commission,* Nos. 75–636 and 75–672, pending in this Court, also involves several issues present in this case, including questions of proof of job assignment discrimination in a suit brought on behalf of a class, the legality of applications of a seniority system which perpetuates that discrimination, and the proper relief to be accorded class members. The resolution of the issues raised in this case and *T.I.M.E.–D.C.* will have a direct effect on the enforcement of Title VII by both the government and private individuals.

STATEMENT

Respondents (plaintiffs below), three Mexican-Americans employed as city truck drivers by petitioner East Texas Motor Freight (ETMF), filed a class action complaint in the United States District Court for the Western District of Texas, alleging that the Company and union defendants violated Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (Supp. V) 2000e *et seq.*, and Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1981, by maintaining policies ~~with~~ which effectively

[3] See *United States* v. *East Texas Motor Freight Systems, Inc.*, *supra.*

prevented Mexican American and black city drivers from obtaining employment in the Company's more lucrative road driver positions (A. 7–19).[4]

Plaintiffs alleged in their complaint that the case was a class action (A. 7–8, ¶2; A. 15, ¶12), and sought class relief (A. 18). In their proposed pretrial order (A. 4) plaintiffs reiterated that they "have requested this court allow the instant proceeding to proceed as a class action" and again asked for class relief. Shortly after the trial began, the court asked plaintiffs' counsel if he maintained that the litigation was a class action and counsel responded in the affirmative (A. 128). The court thereupon stated that it would "keep the question of the class open" (A. 130). Plaintiffs did not move formally for certification as a class action, nor were they required to do so by the local rules (see Resp. Br. 32–33). Similarly, defendants did not move formally to dismiss the class allegation.

Immediately prior to trial, the parties entered into a stipulation "[t]hat the only issue presently before the court pertaining to the company is whether the failure of the defendant, East Texas Motor Freight, to consider plaintiff's line driver applications constituted a violation of Title 7 and 42 USC Section 1981" (A. 115, ¶8). The meaning of that stipulation is contested and remains unclear (see Resp. Br. 32; ETMF Br. 13–14).

After trial was concluded, the district court dismissed the class allegations and decided that the

[4] "A." refers to the joint appendix in this Court.

defendants' actions with respect to the individual plaintiffs had not violated Title VII or Section 1918 (A. 55–67). The district court dismissed the class allegation on the grounds that plaintiffs had failed to move for a prompt determination of the class issue and had "confied the evidence, arguments and post trial brief to the individual claims * * * and * * * stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plantiffs' applications for employment as road drivers" (A. 65).

The court of appeals reversed the district court's dismissal of plaintiffs' class allegations and its conclusion that the defendants had not violated Title VII or Section 1981 (A. 68–111). Concluding that the district court had an independent obligation to resolve the class certification issue, the court of appeals held that a class action "may not be dismissed because the class representatives fail to ask for a ruling on the propriety of the class nature of the suit" (A. 77–78). The court of appeals found that the class claims met the requirements of Rule 23(a) and that a proper class was established under Rule 23(b)(2), Fed. R. Civ. P. (A. 76–81).[5] The court ruled that in conformity with the record evidence the appropriate class was all incumbent minority city drivers within the State of

[5] The court of appeals was of the opinion that the case had been tried as a class action. Petitioners and respondents differ on this issue (see Resp. Br. 31; ETMF Br. 24–25). ETMF contends that the lack of any ruling on the class question created "manifest confusion with respect to the status of the litigation" (ETMF Br. 29).

Texas subject to the relevant collective bargaining agreements.[6]

After certifying the class, the court of appeals proceeded to decide the class liability and remedy issues upon the record which resulted from the trial below. The court concluded that the statistics available established a *prima facie* case of class discrimination which ETMF had failed to rebut (A. 84–90). The court also found that the no-transfer rule and separate seniority rosters perpetuated the effects of the discriminatory hiring policy and were not justified by business necessity (A. 90–93). The union defendants, which had negotiated the collective bargaining agreements embodying the separate seniority roster system, were found to have violated Title VII (A. 97–101). Finally, the court provided transfer and seniority relief to affected minority city drivers, including those working at terminals that do not employ line drivers (A. 103–104).

SUMMARY OF ARGUMENT

The court of appeals correctly held that in the circumstances of this case the district court had an independent responsibility to make a class certification decision notwithstanding plaintiffs' failure to file a formal motion for class certification. In addition, the court of appeals permissibly found the record ade-

[6] In the complaint, respondents sought to represent the class of minority applicants for road positions at ETMF within the State of Texas (A. 7–8). The court of appeals found that respondents had not pursued this contention and that it had been properly dismissed (A. 83).

quate to enable it to conclude that a class of incumbent minority city drivers should be certified. This Court should affirm the court of appeals' decision on those two class action questions.

Petitioners request this Court to address additional important questions concerning the standard of proof in a class discrimination case (ETMF Br. 37–55) and the legality of seniority rules in the trucking industry (Teamsters Br. 23–25). We submit that these questions were prematurely decided by the court of appeals, on the basis of a record that was lacking in relevant and available factual information (see pp. 16–17, *infra*), and that the case should be remanded to the district court to be litigated properly as a class action.

ARGUMENT

1. The district court erred in failing to determine the class action issues until after trial was complete, and the court was prepared to rule on the merits. Although plaintiffs failed to move formally for class certification, they clearly presented a class action issue that the court should have determined before trial. The allegations in the complaint, the proposed pretrial order, and the colloquy with plaintiffs' counsel at trial all fairly presented the court with a class action question.[7] Moreover, the nature of

[7] When a witness other than a named plaintiff was called to testify as to company practices, the following colloquy ensued (A. 129–130): "Mr. Weiss [attorney for ETMF]: I would like just to make one further observation with reference to the class. It

plaintiffs' claims necessarily involved class issues. The heart of plaintiffs' case was the claim that the Company's past discriminatory policy of refusing to hire minorities for road positions was being perpetuated by its no-transfer rule and collective bargaining agreement with the unions. In all these circumstances, including plaintiffs' repeated requests for class relief, the court of appeals correctly held that the plaintiffs had not abandoned their class claims.

The court of appeals held that because plaintiffs were asserting a claim for class relief, the district court was obligated to determine the issue of class certification in a timely fashion, even though plaintiffs did not formally move for certification (A. 77–78). This view has been adopted in other appellate decisions and by commentators. See *Senter* v. *General Motors Corp.*, 532 F. 2d 511, 520–521 (C.A. 6); *Garrett* v. *City of Hamtramck*, 503 F. 2d 1236, 1243 (C.A. 6); *Castro* v. *Beecher*, 459 F. 2d 725, 731 (C.A. 1); *Lau* v. *Nichols*, 483 F. 2d 791, 793, n. 4 (C.A. 9); Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 41 (1967); 7A Wright &

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seems to me that he alleged that it should be a class action. All of the defendants denied that it should. I think it was incumbent upon him prior to the trial to have filed a motion to establish that it was a class action."

"The COURT: I agree. But just for this one witness, unless it gets too far out of hand, Mr. Weiss—he is also offering this witness for the limited purpose of showing the general company practice which would coincide and corroborate the testimony of the parties in the case. I am certainly going to allow it for that purpose and I will keep the question of the class open."

Miller, *Federal Practice and Procedure*, § 1785, p. 128 (1972) ("The court has an independent obligation to decide whether an action brought on a class basis is to be maintained even if neither of the parties moves for a ruling under subdivision (c)(1)"). Cf. *Jackson* v. *Lynn*, 506 F. 2d 233 (C.A. D.C.); *Davis* v. *Romney*, 490 F. 2d 1360 (C.A. 3).

Whatever may be the case in other kinds of suits, in actions under Title VII, in which issues relating to class certification are presented, a determination of those issues prior to (or at least during) trial is generally necessary if the case is to proceed properly. As we said in our brief in *T.I.M.E.–D.C.*, the order and allocation of proof in a Title VII case will vary depending upon a number of factors, including whether the claims are individual in nature or are based upon allegations of a pattern and practice of discrimination against a class of minority individuals. While proof requirements may differ depending upon the facts of the particular case, an individual claiming discrimination in a private, non-class action may be required to demonstrate as part of his *prima facie* case that a vacancy existed for which he was qualified and from which he was excluded for racial reasons. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802. By contrast, in a class discrimination suit, once plaintiffs have demonstrated by statistical and other evidence that a pattern and practice of discrimination exists, the burden will be on the defendant to show "that individuals * * * were not in fact

victims of previous hiring discrimination" (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772). Thus, a focal point of the defense in a class suit might well be the inadequacy of the statistical and testimonial evidence of a pattern of discrimination. By contrast, defendants responding to individual claims could in some cases rest, *inter alia,* upon a showing that the individual claimants were not qualified for the relevant jobs. Thus it generally is important for all parties to know at trial what the nature of the litigation is to be so that they can correctly meet the order and allocation of proof required. Failure to provide timely notice of these evidentiary burdens may cause substantial prejudice to the parties, thereby undermining the fairness of the entire proceeding. This interaction between the class determination and the evidentiary burdens in Title VII cases requires district courts generally to resolve class questions prior to trial, and we believe the failure of the district court to do so in the circumstances of this case calls for remanding the case for trial on the class liability issues.

2. Having determined that the district court's denial of certification was improper, the court of appeals properly certified the case as a class action based upon the factual record and the arguments on that issue by counsel for all parties. Although we believe that it was inappropriate for the court of appeals to decide the class liability issues in the present posture of the case, certification of the case as a class action was a proper exercise of the court of appeals' power to ren-

der an appropriate judgment under 28 U.S.C. 2106.[8] Where the pertinent facts appear in the record and the point to be decided is clear, efficient judicial administration makes class certification by the appellate court appropriate. *Wulff* v. *Singleton,* 508 F. 2d 1211, 1214 (C.A. 8).[9] This principle is particularly applicable to a Title VII suit. Although the specific statutory directive that cases brought under the Act should be "in every way expedited" (Section 706(f)(5), 42 U.S.C. (Supp. V) 2000e–5(f)(5)) is directed at district courts, the underlying purpose of the provision is applicable at all stages of the judicial process.

The evidence in the record fully supports the decision of the court of appeals that all of the requirements for a class action under Rule 23(b)(2), Fed. R. Civ. P., were satisfied. Nearly 200 ETMF minority city drivers employed within the State of Texas were included within the scope of the class plaintiffs sought to represent (A. 352–415). This number clearly

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[8] That Section provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

[9] See also *Locke* v. *Board of Public Instruction, Palm Beach County*, 499 F. 2d 359, 365 (C.A. 5); *Universal Athletic Sales Co.* v. *Salkeld*, 511 F. 2d 904, 907 (C.A. 3). Cf. *Caldwell* v. *Craighead*, 432 F. 2d 213, 216 (C.A. 6), certiorari denied, 402 U.S. 953.

satisfies the "numerosity" requirement of Rule 23 (a)(1).[10]

The questions of law and fact presented by this case were also common to all members of the class as required by Rule 23(a)(2). The plaintiffs contended that all terminals denied minorities hired as road drivers and that the Company-wide no-transfer and contract policies perpetuated this hiring discrimination in violation of Title VII.[11] Plaintiffs' case, therefore, was based on the legal effect that uniform Company policies had on similarly situated minority city drivers.[12] Moreover, there is a common question of law as to whether the no-transfer rule and collective bargaining agreement violate Title VII by perpetuating the discrimination in hiring.

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[10] See, *e.g.*, *Carey* v. *Greyhound Bus Co., Inc.*, 500 F. 2d 1372, 1380–1381 (C.A. 5); *Arkansas Education Ass'n.* v. *Board of Education*, 446 F. 2d 763, 765 (C.A. 8); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 246 (C.A. 3), certiorari denied, 421 U.S. 1011; *Cypress* v. *Newport News General & NonSectarian Hospital Ass'n.*, 375 F. 2d 648, 653 (C.A. 4).

[11] The Company contends that since each terminal is responsible for its own hiring "it is entirely possible that employment policies at one East Texas Motor Freight terminal might be discriminatory while those at another * * * terminal are not" (ETMF Br. 33). The record shows, however, that at the time of the EEOC charge in this case, none of the Company's six road terminals in Texas had ever hired a single minority road driver (A. 113–114). Indeed, this pattern existed at every Company road terminal throughout the country (A. 445). The existence of a common question of fact as to a general hiring policy with respect to road drivers is thus clear.

[12] See *Senter* v. *General Motors Corp.*, 532 F. 2d 511, 524 (C.A. 6); *Reed* v. *Arlington Hotel Co.*, 476 F. 2d 721, 723 (C.A. 8), certiorari denied, 414 U.S. 854; *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 719 (C.A. 7); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 250 (C.A. 3), certioriai denied, 421 U.S. 1011; *Graniterville Co.* v. *Equal Employment Opportunity Commission*, 438 F. 2d 32, 37 (C.A. 4).

Since plaintiffs' claims encompassed those of all other class members, they satisfied the typicality requirement.[13] As city drivers domiciled at a non-road terminal, plaintiffs had to rely on the same legal theory, and were required to prove the same elements of discrimination, which established the rights of city drivers domiciled at road terminals.

Plaintiffs' attorney is qualified, experienced and able to conduct the proposed litigation. The plaintiffs have no interests antagonistic to the class and the interests of the representative and of the class are co-extensive with respect to the elimination of the unlawful policy at issue. See *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 247 (C.A. 3), certiorari denied, 421 U.S. 1011; *Barnett* v. *W. T. Grant Co.*, 518 F. 2d 543, 548 (C.A. 4). Plaintiffs were required to establish the right to relief of each member of the class in order to establish their own claim.[14] ETMF admits that, to the extent that plain-

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[13] Although there is confusion as to the interpretation of the typicality provision (see *Penn* v. *San Juan Hospital, Inc.*, 528 F. 2d 1181, 1189 (C.A. 10)), to the extent that it imposes an independent requirement in addition to other provisions of Rule 23(a), it is generally satisfied where "the claims * * * of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory" (7 Wright & Miller, *Federal Practice and Procedure*, § 1764, p. 90 (1975 Pocket Part)) and where "the legal or factual position of the representatives is markedly different from that of other members" (*ibid.*). See, *e.g.*, *Gonzales* v. *Cassidy*, 474 F. 2d 67, 71, n. 7 (C.A. 5).

[14] Since the San Antonio terminal is as distant from a road terminal as any other Texas non-road terminal, in establishing their own right to relief plaintiffs necessarily had to show that these other minority city drivers also were entitled to relief. Plaintiffs therefore satisfied Rule 23(a)(3).

tiff's claims differed from those of the class, plaintiffs' were weaker than those of other class members (see ETMF Br. 34). In fact, it was possible that even though plaintiffs were not able to establish their own claims, the claims of other class members nevertheless would have been upheld. In these circumstances plaintiffs could be expected to represent the interests of the class adequately within the meaning of Rule 23(a)(4). See, generally, *Reed* v. *Arlington Hotel Co.*, 476 F. 2d 721 (C.A. 8), certiorari denied, 414 U.S. 854; *Mack* v. *General Electric Co.*, 329 F. Supp. 72 76 (E.D. Pa.).[15]

Finally, this action also met the requirements of Rule 23(b)(2). Most Title VII actions are by their very nature class actions, since they involve claims of discrimination on the basis of class characteristics. Courts have therefore held with virtual unanimity that actions under Title VII are properly maintainable under Rule 23(b)(2). *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 250–251 (C.A. 3), certiorari denied, 421 U.S. 1011; *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1375 (C.A. 5); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 801–802 (C.A.

[15] Although the relief sought by all city drivers involved the same road vacancies, this does not establish a conflict or antagonism within the meaning of subsection (a)(4). As long as all class members were united in the contention that defendants had discriminated against them, a potential conflict as to relief, which apparently has not materialized, does not defeat the maintenance of a class action. See *Blackie* v. *Barrack*, 524 F. 2d 891, 909 (C.A. 9). Furthermore, the district court could, if necessary, shape relief in order to eliminate any conflicts between subclasses of minority city drivers domiciled at road and non-road terminals.

4); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 720 (C.A. 7).

The court of appeals was, therefore, correct in reversing the dismissal of plaintiffs' class allegations and in certifying this case as a Rule 23(b)(2) class action.[16]

3. While the court of appeals was correct in reversing the judgment and certifying the class, we believe that its contemporaneous determination of liability to the class was premature and possibly prejudicial to the petitioners in their defense of the case. Cf. *Jimenez* v. *Weinberger*, 523 F. 2d 689, 699 (C.A. 7). Even though, as we have argued, the district court had an independent obligation to determine whether certification was proper, the court did not do so. As a result it cannot be said with assurance that the parties had adequate notice of the allocation and order of proof that would typically follow from a class certification decision at the outset, or, in particular, that the defense was conducted as it would have been in response to a class action. In light of the evidence developed by the government in its case against

[16] Petitioner ETMF makes abstract claims that certification by the court of appeals deprived the defendants of their right to submit evidence and advance legal argument on the class certification issue (ETMF Br. 16), but fails to specify what other information might be adduced or legal arguments made in addition to those presented to the court of appeals. Petitioners' only specific arguments are addressed, not to the propriety of the class certification, but to the scope of the class certified, and the possible propriety of subclasses (ETMF Br. 33–36). However, these concerns can be fully accommodated by the district court's discretion on remand to consider appropriate options, including the use of subclasses, for the disposition of the class action claims.

ETMF (see *infra*), it seems unlikely that it or the other petitioners can successfully defend a properly presented *prima facie* case of class discrimination; however, they should be given an opportunity to attempt to do so. The case, accordingly, should have been remanded to the district court for further trial on a class action theory.

The state of the record also makes this case inadequate for consideration by this Court of important questions of liability and remedies in Title VII class litigation. As the Statement, *supra,* makes evident, the evidence in this record is limited, in fact it represents only a small portion of the pertinent information available concerning the employment practices of ETMF. Among the relevant information available but not contained in the record are stipulations regarding the earnings differential of city drivers and line drivers (*United States* v. *ETMF,* Pltf. Ex. 44),[17] testimony concerning the Company's practice of referring white applicants at one terminal to road driver positions at another (*United States* v. *ETMF,* Tr. 663–664), examples of white applicants referred to or hired at terminals other than where they resided (*United States* v. *ETMF,* Pltf. Ex. 17, Tab 9; Pltf. Ex. 18, pp. 1–3, 5), deviations in ETMF's "hiring standards" as applied to white applicants (*United States* v. *East Texas Motor Freight System, Inc.,*

[17] Relevant portions of the record in *United States* v. *ETMF*, including portions cited herein, have been lodged with the Court by *amicus curiae* N.A.A.C.P. Legal Defense and Educational Fund, Inc., in a document entitled "Exhibit of Amicus Curiae, N.A.A.C.P. Legal Defense and Educational Fund, Inc."

supra, 10 EPD at 5416, 10 FEP Cases at 973), evidence that approximately 25 percent of the Company's road drivers did not meet the minimum standards when hired (*United States* v. *ETMF,* Pltf. Ex. 13), unrebutted testimony that ETMF's policy was to not hire blacks or Mexican-Americans as road drivers (*United States* v. *ETMF,* Tr. 143–144), and unrebutted testimony that the no-transfer rule was implemented in order to prevent incumbent black drivers who had expressed interest from transferring to road driver jobs (*United States* v. *ETMF,* Tr. 152). Any decision on liability or remedy issues would thus not only take place in a vacuum, but would be artificially abstracted from evidentiary material which is known to be available and which can be developed in a proper trial on the class action claims. Moreover, most of these issues are present in *T.I.M.E.–D.C.* in the context of a broader more detailed record resulting from a trial in which all parties were fully apprised from the outset that the case would be tried and decided on the basis of the pattern and practice allegations.

We therefore believe that the Court should not reach important substantive questions of Title VII enforcement in the context provided by the record in this case. The case should be remanded to the trial court for further proceedings as a class action. That disposition would permit the district court properly to examine all of the evidence relevant to ETMF's employment practices and petitioners' defenses, and to consider in light of further evidence whether any ad-

justments should be made in the definition of the class (see Resp. Br. 33, n. 33).[18]

CONCLUSION

The judgment of the court of appeals should be affirmed on the class action questions. The court of appeals' judgment as to liability should be vacated and the case remanded for trial proceedings consistent with this Court's decision in *International Brotherhood of Teamsters and T.I.M.E.–D.C.* v. *United States and Equal Employment Opportunity Commission*, Nos. 75–636 and 75–672.

Respectfully submitted.

ROBERT H. BORK,
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Equal Employment Opportunity Commission.

DECEMBER 1976.

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[18] Proceedings on remand would, of course, be conducted in light of this Court's guidance in resolving the questions presented in *T.I.M.E.–D.C.*

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